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I. INTRODUCTION

"[T]his is really, really fucking brilliant. Really, really great," exclaimed U2 front man Bono during his acceptance speech for "Best Original Song" at the 2003 *Golden Globe Awards*, resulting in a deluge of complaints to the FCC.[1] In response, the FCC's Enforcement Bureau issued a *Memorandum Opinion and Order* finding that "[t]he word 'fucking' may be crude and offensive, but, in the context presented here, [it] did not describe sexual or excretory organs or activities."[2] The bureau further mentioned, "when offensive language is used as an adjective to emphasize an exclamation . . . or it is used as an insult . . . , then it falls beyond the scope of the indecency regime."[3]

Upset with the decision, a group of people affiliated with the Parents Television Council (PTC) pressured the FCC until the agency finally agreed to revisit the bureau's prior decision.[4] In a *Memorandum Opinion and Order* released on March 18, 2004, the FCC departed from its prior position and promulgated a new policy concerning the fleeting—or nondeliberate, nonrepetitive, and otherwise isolated—use of expletives on

1. Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d Cir. 2007).

2. Complaints Against Various Brdcst. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 18 F.C.C.R. 19859, para. 5 (2003) [hereinafter *Golden Globe Order*], *rev'd*, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975 (2004).

3. Dave E. Hutchinson, Note, *"Fleeting Expletives" Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation*, 61 FED. COMM. L.J. 229, 245 (2008) (citing *Golden Globe Order*, *supra* note 2, at para. 5) (citation omitted).

4. *See id.*

public airwaves.[5] Although the *Order* indicated that it would be inappropriate to punish NBC in this case since the network did not have adequate notice of the new policy, the FCC was clear that the fleeting or incidental use of expletives would be subject to punishment in the future.[6]

As a result, a number of broadcast networks sought legal reprieve in the Second Circuit, arguing that the new policy was both arbitrary and capricious under the Administrative Procedure Act (APA) and unconstitutional under the First Amendment.[7] In an opinion by Judge Rosemary S. Pooler, writing on behalf of a three-judge panel, the Second Circuit agreed that the new policy was arbitrary and capricious, but opted to bypass the constitutional question for the time being.[8] The FCC subsequently petitioned the Supreme Court for review, and on March 17, 2008, the Supreme Court granted certiorari.[9]

In a somewhat surprising opinion authored by Justice Scalia, the Supreme Court reversed the decision of the Second Circuit. Like the Second Circuit, however, the Supreme Court did not address the First Amendment issue underlying the FCC's policy, and instead based its decision on the premise that the policy was "entirely rational" and therefore neither arbitrary nor capricious.[10]

Despite the Court's opinion, the controversy surrounding the use and regulation of expletives on the public airwaves was not dead. Not too long ago, in fact, the issue made headlines following the September 26, 2009, season debut of *Saturday Night Live*, during which one of the comedians, Jenny Slate, inadvertently said the word "fucking" as opposed to the word "freaking," in a planned skit.[11] Even more recently, on July 13, 2010, the Second Circuit, on remand from the Supreme Court, determined that the FCC's policy concerning fleeting expletives is unconstitutional in violation of the First Amendment.[12]

With national attention again focused on the issue of fleeting expletives, it has become worthwhile to evaluate the Supreme Court's decision in *Federal Communications Commission v. Fox* to determine what

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5. *See* Complaints Against Various Brdcst. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, para. 12 (2004).

6. *See id.* at paras. 12–15.

7. Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 454–55 (2d Cir. 2007).

8. *See id.*

9. Lyle Denniston, *Court Grants Review of Indecency Law, 7 Other Cases*, SCOTUSBLOG (Mar. 17, 2008, 10:02 AM) http://www.scotusblog.com/2008/03/court-grants-review-of-indecency-law/.

10. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1812 (2009).

11. *Saturday Night Live* (NBC television broadcast Sept. 26, 2009).

12. Fox TV Stations, Inc. v. FCC, 613 F.3d 317, 335 (2d Cir. 2010).

led to the result in that case. It is also important to consider what might happen now that Sonia Sotomayor has replaced David Souter and Elena Kagan has replaced John Paul Stevens. After considering four prevailing models of judicial decision making, this Note contends that Supreme Court Justices decide cases predominately in accordance with their judicial attitudes and personal ideologies. Consequently, based on the ostensible attitudes of the current Justices, if the Court soon addresses the First Amendment issue, it seems that the outcome will likely favor the broadcasters.

This Note begins in Part II by discussing in more depth the decisions by the Second Circuit as well as the decision by the Supreme Court. Part III of this Note evaluates the four leading models of judicial decision making—the legal model, the attitudinal model, the strategic model, and the historic-institution model—and posits that the attitudinal model has achieved the greatest record of success when it comes to predicting and explaining the outcome of various cases. Part IV applies these four models to the Supreme Court's decision in *Federal Communications Commission v. Fox*, concluding ultimately that the attitudinal model provides the most coherent explanation for the outcome, and thereby leading to the implication that the result of a future fleeting-expletives case hinges mostly on the composition of the Court. Part V then sets up a prediction for how the fleeting expletives issue will ultimately be resolved by considering the judicial attitudes of recent appointee Sonia Sotomayor as well as the apparent attitudes of the remaining Justices, including the recently confirmed Elena Kagan. The Note generally concludes that if a First Amendment challenge surfaces before the Court, the Court will most likely invalidate the FCC's current policy, paving the way for a new era in the regulation of broadcast media.

II. THE CASE: *FEDERAL COMMUNICATIONS COMMISSION V. FOX*

After the FCC came out with its new policy governing the use of fleeting expletives, Fox Television Stations, along with CBS, WLS, KRTK, KMBC, and ABC, appealed to the Second Circuit, asking the court to consider whether the policy was legally justified.[12] A number of other parties, including NBC, FBC, and the Center for the Creative Community, joined as intervenors.[13] Although the impetus for the FCC's policy change was the controversy surrounding the *2003 Golden Globe Awards*, the facts that gave rise to the case involved four particular broadcasts that were allegedly indecent, albeit retroactively, under the *Golden Globe Order*.

The first was Fox's broadcast of the *2002 Billboard Music Awards*.

12. *Fox v. FCC*, 489 F.3d at 452.

13. *Id.* at 454.

Similar to the events of the *Golden Globes*, musician Cher caught Fox off guard during an acceptance speech when she said, "People have been telling me I'm on the way out every year, right? So fuck 'em."[14] The second was at the *2003 Billboard Music Awards*, where one of the show's presenters, Nicole Richie, rhetorically inquired, "[h]ave you ever tried to get cow shit out of a Prada purse?" and then retorted, "[i]t's not so fucking simple."[15] The third involved a series of broadcasts of ABC's *NYPD Blue*, in which one of the characters, Detective Andy Sipowicz, used the words "bullshit," "dick," and "dickhead."[16] The last concerned a broadcast of CBS's *Early Show* in which one of the contestants on the show *Survivor* called another contestant a "bullshitter."[17]

Shortly after the case was filed, the FCC moved for a voluntary remand to give the FCC a chance to address petitioners' arguments.[18] The FCC then issued its *Remand Order*,[19] which replaced the *Golden Globe Order* but reaffirmed the FCC's finding that the *2002* and *2003 Billboard Music Award* broadcasts were indecent and profane, meaning that the broadcasts depicted or described sexual or excretory activities.[20] The *Remand Order* reversed the decision against the *Early Show*, finding it to be a bona fide news program and dismissed the claim against *NYPD Blue* on the basis that the questionable language occurred during the safe harbor time period.[21] Fox then moved for review of the *Remand Order* and filed a motion to consolidate that appeal with the one already before the court.[22]

On appeal, Fox and the other petitioners raised several arguments, but because the court agreed with Fox that the FCC's policy was arbitrary and capricious, it went no further in its analysis. When evaluating an agency decision under the arbitrary and capricious standard, courts typically require the agency to examine the pertinent facts and provide a satisfactory explanation for its action. As the Second Circuit indicated, there must be a "rational connection between the facts found and the choice made."[23] This review is narrow, and it is not the job of the court to substitute its judgment

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14. *Id.* at 452.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 453.

19. *See* Complaints Regarding Various TV Brdcsts. Between Feb. 2, 2002 and Mar. 8, 2005, *Order*, 21 F.C.C.R. 13299, para 1 (2006) [hereinafter *Remand Order*].

20. *Id.*

21. *Fox v. FCC*, 489 F.3d at 453–54; *see also* 47 C.F.R. § 73.3999(b) (2010) (describing the safe-harbor time period as the hours between 10:00 p.m. and 6:00 a.m.).

22. *Fox v. FCC*, 489 F.3d at 454.

23. *Id.* at 455 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (internal quotation marks omitted).

for that of the agency.[24]

Using this framework, the Second Circuit found that the FCC's policy was arbitrary and capricious because it represented a complete shift from previous policy, the reason for which was unclear.[25] Prior to 2003, for example, the "FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime."[26] Recognizing as much, the FCC agreed that it was making a change, saying "[i]n the *Golden Globe Order*, the Commission made clear that it was changing course with respect to the treatment of isolated expletives."[27]

The court then determined that the FCC's justifications for departing from its prior rulings were inadequate. As the court mentioned, "[a]gencies are of course free to revise their rules and policies. Such a change, however, must provide a reasoned analysis for departing from prior precedent."[28] Attempting to provide such a reasoned analysis, the Commission relied primarily on the Supreme Court's opinion in *Federal Communications Commission v. Pacifica Foundation*.[29] In that case, the Court was persuaded that material on public airwaves enters the home without warning, and wrote, "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[30]

The Second Circuit rejected this justification because it failed to explain why fleeting expletives suddenly amounted to a "first blow" when they never did in the past.[31] The court also stated that the policy was not appropriately tailored under the first blow theory because there were certain exceptions that would allow the same words to be used in one context but not another. A broadcaster could, for example, air a taping of the oral argument in this case, during which the same offensive expletives were routinely used, on the basis that in such a context, the airing would have journalistic or artistic importance.[32] Likewise, a broadcaster also could air an unedited version of the movie *Saving Private Ryan* because the expletives are integral to the work and deleting them would have diminished the realism and effect of the movie.[33] Because of such

24. *Id.* at 455.

25. *Id.*

26. *Id.*

27. Brief of Respondent at 33, Fox TV Stations v. FCC, 489 F.3d 444 (2007) (Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag), 2006 WL 5486967 at *33.

28. *Fox v. FCC*, 489 F.3d at 456 (citations omitted).

29. 438 U.S. 726 (1978).

30. *Id.* at 748–49.

31. *Fox v. FCC*, 489 F.3d at 458.

32. *Id.*

33. *Id.* at 458–59 (citing Complaints Against Various TV Licensees Regarding Their

exceptions, unwilling viewers or listeners would still be subject to the first blow, the court reasoned.[34] As a result, the Second Circuit found the new policy to be arbitrary and capricious.

The Supreme Court reversed the Second Circuit's decision by a five-to-four vote, finding that the policy was neither arbitrary nor capricious.[35] Justice Scalia announced the opinion of the Court, which was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. There were seven opinions altogether, as Justice Scalia lost a majority for Part III-E of his opinion.[36] The majority opinion rejected the Second Circuit's application of what it called a heightened—or more searching—arbitrary and capricious review standard.[37] More importantly, the Court mentioned that the Second Circuit erred by requiring the FCC to provide a more satisfactory justification for the change in policy than that which was required to adopt the original policy in the first place.[38]

Justice Thomas filed a concurring opinion, which was joined by Justice Kennedy, in which he agreed with the result based on the Administrative Procedure Act, but questioned the validity of the Court's precedent concerning the regulation of broadcast media.[39] Justice Kennedy filed a separate concurring opinion that repeated the Second Circuit's legal standard, but found that the FCC had not failed to provide a reasoned explanation for its policy change.[40] By contrast, Justice Stevens's dissenting opinion suggested that the FCC, in fact, did fail to explain its policy change.[41] Justice Ginsburg filed a separate dissenting opinion forecasting the ramifications of the new policy on the First Amendment.[42] The lead dissenting opinion, authored by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, found not only that the FCC had failed to provide a reasoned explanation for its change in policy but also that it had failed to identify the underlying circumstances necessitating

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Broadcast on Nov. 11, 2004, of the ABC TV Network's Presentation of the Film "Saving Private Ryan," *Memorandum Opinion and Order*, 20 F.C.C.R. 4507, para. 14 (2005)).

34. *Id.* at 459.

35. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009).

36. As this case illustrates, the Court has departed from a time in which the consensual norm of the Justices was to issue unanimous opinions. The reason for this departure, some scholars contend, is that dissenting and concurring opinions provide a mechanism for the Court to increase its power and legal control over society in light of the contentious cases the Court now hears. *See* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 286–87 (2007).

37. *See FCC v. Fox*, 129 S. Ct. at 1810.

38. *Id.*

39. *Id.* at 1819–20 (Thomas, J., concurring).

40. *Id.* at 1824 (Kennedy, J., concurring).

41. *See id.* at 1826 (Stevens, J., dissenting).

42. *See id.* at 1829 (Ginsburg, J., dissenting).

change to begin with.[43]

Like the decision from the Second Circuit, the Supreme Court's decision did not address the underlying First Amendment issue. Justice Scalia asserted, "[i]f the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's 'arbitrary [or] capricious' standard; its lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge."[44] Because of the Supreme Court's role as final arbiter and not first reviewer, Scalia unsurprisingly saw no reason to "abandon . . . usual procedures in a rush to judgment without a lower court opinion [addressing the constitutional question]."[45]

Thus, while this case focused solely on whether the FCC's policy was arbitrary and capricious and not on whether the policy was constitutional, it seems likely that the Court will need to decide the First Amendment issue at some point. Indeed, given the Second Circuit's recent remand decision finding the FCC's policy to be unconstitutionally vague in violation of the First Amendment, it has become even more necessary for the Supreme Court to finally resolve the constitutional issue.[46] After evaluating four primary models of judicial decision making, this Note contends that if the Court addresses the First Amendment issue, the attitudes of the justices will lead to a result that favors the broadcasters.

III. FOUR MODELS OF JUDICIAL DECISION MAKING

A. The Legal Model

Probably the most easily identifiable model of judicial decision making is the legal model. The legal model posits that judges base decisions solely in accordance with the law, which is developed primarily by previous cases and the canons of statutory interpretation.[47] As Chief Justice John Roberts famously quipped during his confirmation hearing, "Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role."[48]

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43. *See FCC v. Fox*, 129 S. Ct. at 1829 (Breyer, J., dissenting).

44. *Id.* at 1812.

45. *Id.* at 1819.

46. Fox TV Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).

47. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 32 (1993).

48. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee).

Although the legal model is based upon the notion that judges and Justices are neutral umpires, Harold J. Spaeth identifies four major tools or methods of analysis that legalists often employ. The first looks only at the plain meaning of the text. This method "simply holds that judges rest their decisions on the plain meaning of the pertinent language,"[49] which applies to not only statutes and constitutional provisions, but also to the Justices' own judicially created rules.[50] The problem, though, is that the plain meaning is often indeterminate, which in many cases renders this tool unhelpful to judicial decision makers.

If the text is not readily ascertainable, the second guiding tool available to legalists is the legislative and framers' intent. As Spaeth mentions, "[l]egislative and framers' intent refers to construing statutes and the Constitution according to the preferences of those who originally drafted and supported them."[51] Virtually any information that can be elicited from the historical record preceding the enactment is available for consideration.[52] Thus, this method can sometimes provide more guidance to the Justices when the plain meaning is unclear.[53] Yet, in many cases, it is nearly impossible to determine what motivated a legislator to vote the way he or she did, despite what the legislative history may reveal.

A third method of legalistic analysis focuses heavily on case precedent. This method is perhaps observed most commonly, since nearly every case cites to precedent as a way to help justify the outcome.[54] When statutory or constitutional language is unclear, judges consider how previous judges have interpreted the text, with a goal of guaranteeing some consistency in the application of the law. One unfortunate characteristic of precedent, though, is that ambiguous text, by its nature, can often be interpreted in more than one way, leading to the result that precedent does not always provide clear guidance to judges seeking to apply the law.[55]

The fourth and final method or analytical tool that judges might employ is a form of balancing that weighs the collective interest or public good on one side against the individual interests at stake on the other. Balancing can be either ad hoc (done on a case-by-case basis) or definitional (where the court "employs one or more hard-and-fast rules to

49. SEGAL & SPAETH, *supra* note 47, at 34.

50. *See id.*

51. *Id.* at 38.

52. *See id.* at 38–40.

53. The most useful elements of legislative intent include, in order of importance, committee reports, bills and their amendments, sponsor remarks, and committee hearings. *See* Peggy Jarrett & Cheryl Nyberg, *Introduction*, FEDERAL LEGISLATIVE HISTORY, http://lib.law.washington.edu/ref/fedlegishist.html (last visited Nov. 12, 2010).

54. SEGAL & SPAETH, *supra* note 47, at 44.

55. *See id.* at 44–45.

rationalize a decision.").[56] Naturally, ad hoc balancing gives judges more leeway to evaluate the facts of a particular case without reference to prior rules or tests.[57] Despite its inherent subjectivity, Spaeth notes, "justices commonly label [balancing] an objective criterion," thereby fitting it nicely within the legal model of judicial decision making.[58]

Probably the greatest appeal of the legal model is that it comports with the perception of the Court as an independent and impartial branch of government that makes black-and-white decisions based purely on the law. In many situations, especially situations in which the statutory language is unequivocal or the case precedent is obviously one-sided, the legal model is an effective tool for explaining the Court's decisions. When the Court experiences new questions of law and changing social attitudes, however, the legal model continually reveals its shortcomings.[59]

B. The Attitudinal Model

The most widely accepted model of judicial decision making by scholars and legal analysts is the attitudinal model. The attitudinal model varies markedly from the legal model. Justices often discredit its validity as a way to explain the outcome of their cases.[60] As Spaeth nevertheless suggests, the attitudinal model presumes that the "justices decide . . . cases on the basis of the interaction of their ideological attitudes and values with the facts of a case. . . . In other words, the justices vote as they do because they want their decisions to reflect their individual personal policy preferences."[61]

There are two basic iterations of the attitudinal model.[62] The first evaluates the behavior of justices in very narrowly defined issues—that is, how justices react to specific issues such as the death penalty, commercial speech, or affirmative action.[63] The second iteration analyzes the behavior of Justices in much broader terms.[64] Under this broader view, one might evaluate how Justices tend to vote on issues generally falling under the

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56. *Id.* at 52.

57. *See id.* at 53.

58. *Id.* at n.82.

59. *See* KENT GREENAWALT, LAW AND OBJECTIVITY 11 (1992) (arguing that "any extreme thesis that 'the law' is always or usually indeterminate is untenable."); *see also* RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION 1 (1998) (suggesting that there are "internally-correct [sic] answers to all legal-rights questions.").

60. Harold J. Spaeth, *The Attitudinal Model, in* CONTEMPLATING COURTS 296, 306 (Lee Epstein, ed. 1995).

61. *Id.* at 305.

62. *Id.*

63. *Id.*

64. *Id.*

umbrella of civil rights or business regulation.[65]

Although the attitudinal model seems to be widely accepted by many people, there is still some disagreement among scholars on the source of attitudes. The debate generally revolves around "whether an individual acquires [his or her attitudes] genetically or as a result of environmental experience—and whether the justices' personal policy preferences extend to normative considerations, such as judicial restraint and strict construction, or to procedural matters, such as venue and mootness, or operate only substantively."[66] Despite this apparent source of disagreement, however, Spaeth posits that any differences in the origins of attitudes do not affect the underlying assumptions of the attitudinal model and only direct the focus of the analyst.[67]

Spaeth's formulation of the attitudinal model describes the Justices in terms of their political ideology. Justices are therefore categorized as being either liberal, moderate, or conservative as identified first by the Justices' prior voting record, and second, if no such record exists, by newspaper editorials that classify the nominees before their confirmation as liberal or conservative on issues of civil rights and civil liberties.[68] Spaeth then uses *Guttman scaling* to predict the outcome of certain cases. This method is cumulative in nature, meaning it "assumes that persons who respond favorably to a given question will also respond favorably to all less extreme questions."[69]

Using that analysis, Spaeth considered the issue of capital punishment and found a remarkably consistent voting pattern of the Justices, such that the most liberal justice consistently supported the person subject to capital punishment and the most conservative Justice consistently voted to uphold the death sentence.[70] The remaining Justices fell somewhere in the middle along a continuum of ideological preferences. The pattern continued for each of the nine Justices, seemingly demonstrating a clear correlation between the Justices' personal ideologies and their voting patterns.[71] Other scholars have found that, in various appellate courts, liberal panels issue a liberal ruling well over half of the time, while conservative panels reach a liberal result well under half of the time.[72] As a result, it is evident that the attitudinal model is often capable of providing useful insight into the

65. *Id.*
66. *Id.* at 305–06.
67. *Id.*
68. *Id.* at 310.
69. *Id.* at 308.
70. *Id.*
71. *Id.* at 309.
72. *See* Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals*, 90 VA. L. REV. 301, 306 (2004).

outcome of cases.

C. *The Strategic Model*

There are many similarities between the strategic model and the attitudinal model. Most importantly, both models recognize that "justices, first and foremost, wish to see their policy preferences etched into law. They are, in the opinion of many, 'single-minded seekers of legal policy.'"[73] The strategic account purports to go further, though, claiming that while the Justices are indeed motivated by their own individual policy preferences, they are not unconstrained actors who base decisions exclusively on their own ideological attitudes. "Rather, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."[74]

In *The Choices Justices Make*, Lee Epstein and Jack Knight identify the major components of the strategic model. The first is that Justices are driven by a desire to effectuate their individual goals.[75] Epstein and Knight suggest that the Justices' decisions can be explained by the rational choice paradigm, which assumes that the Justices are rational actors. Rational actors presumptively make rational decisions, based on the belief that such a course of action will most likely advance his or her goals.[76] But even proponents of the strategic model recognize that a Justice's goals often reflect his or her attitudes, raising questions about whether seemingly strategic behavior is more likely just a reflection of the attitudinal model at work.[77]

The second major component of the strategic account is strategic interaction. This component embodies the principle that if Justices want to materialize their policy preferences, they have to act strategically in making their choices.[78] Epstein and Knight describe this phenomenon as *interdependent decision making*. A strategic Justice knows, for example, that the maximization of his or her policy preferences is dependent upon the preferences and expected actions of the other Justices, which are in turn dependent upon their individual preferences.[79]

The last component of the strategic account addresses the role of

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73. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9–10 (1998) (quoting Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. R. 325 (1992)).

74. *Id.* at 10.

75. *Id.* at 10–11.

76. *Id.* at 11.

77. *See generally id.*

78. *Id.* at 12.

79. *Id.*

institutions as it relates to judicial decision making. Epstein and Knight indicate that institutions can be "formal, such as laws, or informal, such as norms and conventions."[80] To elucidate the role of institutions more clearly, Epstein and Knight discuss the processes governing the creation of precedent. Because the Court must issue a majority opinion—that is, one that is signed by at least five Justices—in order for the opinion to "become law of the land,"[81] the Justices are sometimes forced to pursue their policy goals in somewhat unconventional ways.

In *Craig v. Boren*,[82] a case about gender-based equal protection, the Court adopted an intermediate standard of review that is less stringent than strict scrutiny but more stringent than rational basis review.[83] Epstein and Knight suggest that the Court took this approach because at least five of the Justices wanted gender-based equal protection claims to be subject to heightened review, but because the Court could not command a majority for strict scrutiny, it had to develop an intermediate test.[84] Epstein and Knight also highlight how the "good behavior" provision in Article III of the Constitution[85] affects or influences the Justices' actions. For example, since many people believe that Justices are accorded life tenure barring any egregious ethical or criminal violations, Epstein and Knight contend that the Justices are, by virtue of the institution in which they work, relatively free to focus their energy on satisfying their policy preferences.[86]

Altogether, it is evident that the strategic account of judicial decision making can sometimes explain the Justices' behavior. But because the strategic model works only on the assumption that Justices are motivated by individual goals, which often implicate their individual ideologies or personal attitudes, it is, in many cases, difficult to divorce strategic behavior from the attitudes that actually inform that behavior in the first place.

D. The Historic-Institution Model

Historic institutionalists agree with proponents of the strategic model to the extent that the model holds that Justices are somewhat motivated by the institutional norms and customs of the political branch in which they work.[87] But institutionalists suggest that the strategic account does not go

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80. *Id.* at 17.

81. *Id.*

82. 429 U.S. 190 (1976).

83. *See id.*

84. *See* EPSTEIN & KNIGHT, *supra* note 73, at 17.

85. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.").

86. *See* EPSTEIN & KNIGHT, *supra* note 73, at 17.

87. Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive*

far enough. To put it simply, institutionalists contend that the Justices are influenced predominately by their role in deciding actual cases and the mission of the Court as a separate branch of government.[88]

Historic institutionalists begin their analysis by uncovering the so-called mission of the Court.[89] As Howard Gillman indicates, the first step toward uncovering the Court's mission is to review the foundational documents, such as Article III of the Constitution, which identify the Court's job description.[90] In line with Article III, Gillman says that there is "evidence that most justices act in accordance with the Court's formal responsibility to decide actual legal disputes based on their best understanding of law."[91] Yet, historic institutionalists understand that the foundational documents do not paint the entire picture, as Justices often are motivated by different goals, such as preserving the political system as a whole or preserving the Court's institutional legitimacy.[92]

In fact, there are a number of organizational or contextual factors that influence judicial decision making including:

> the Court's relationship to a central government in a federal system, the fact that decisions are made by a majority of a small group of people, the elaborate (and changing) norms governing justiciability and the authority of *stare decisis*, the creation of intermediate courts of appeals, the expansion of the Court's constitutional and statutory jurisdiction, the elimination of mandatory appeals, the Rule of Four, the hiring of law clerks, the secrecy of the conference, the ability to print and circulate drafts of opinions, even the move to the so-called Marble Temple in 1935.[93]

It is within the context of these various factors that the Justices make their decisions. As Gillman notes, it is unlikely that the institutional characteristics of the Court influence the judges' and Justices' behavior only so far as those characteristics channel or constrain the judges' and Justices' individual policy interests.[94] "While it is true that life tenure might make it easier to promote policy preferences, it may also be central to a judge's sense of duty to resist political pressure and decide a case in accordance with the law."[95] If one understands the institutional characteristics of the Court as stemming from "a concern about the

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Institutionalism and the Analysis of Supreme Court Decision-Making, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65–67 (Cornell W. Clayton & Howard Gillman eds., 1999).

88. *See id.*
89. *See id.* at 78–80.
90. *Id.* at 80.
91. *Id.*
92. *Id.* at 81.
93. Gillman, *supra* note 87, at 82.
94. *Id.* at 83.
95. *Id.*

accomplishment of substantive concerns and functions" (i.e., the Court's mission), and also understands that preserving those functions is central to the identity of the Court as an institution, the Court's ability to accomplish goals beyond the Justices' individual policy interests becomes clear.[96]

Historic institutionalists argue that the Justices of the Court "should be expected to deliberate about protecting their institution's legitimacy and (relatedly) adapting their institution's mission to changing contexts and the actions of other institutions."[97] Gillman explains that the Justices consciously avoid self-inflicted wounds that can discredit the Court's supposed role as an independent and impartial branch of government as opposed to a policymaking body.[98] According to Gillman, it is this conscious attempt to avoid undermining the Court's reputation as an independent branch of government that informs the Justices' behavior in many cases. For example, Gillman suggests that the Justices' recognition of the importance of maintaining the Court's institutional legitimacy led the Court to develop a unanimous front in *Brown v. Board of Education*.[99] Observing that proponents of the strategic model would label such actions as clear examples of strategic behavior, Gillman contends that the difference is that the Court was motivated by an altruistic desire to preserve the legitimacy of the Court as an institution rather than the Justices' desire to maximize their individual policy preferences.[100]

IV. EXPLAINING *FEDERAL COMMUNICATIONS COMMISSION V. FOX* IN TERMS OF THE FOUR DOMINANT MODELS OF JUDICIAL DECISION MAKING

Although it is clear that each of the four models of judicial decision making has useful tenets that can sometimes assist one's understanding of the outcome of certain cases, the attitudinal model boasts the greatest record of success and overall capability for explaining how Justices act and predicting how they will decide cases. Not surprisingly, the attitudinal model best explains the Justices' actions leading to the outcome of *Federal Communications Commission v. Fox*. The other models, for one reason or another, succumbed to their inherent weaknesses and failed to provide necessary insight into the Justices' behavior.

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97. *Id.*
98. *Id.* at 81.
99. *Id.*
99. *Id.* (discussing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
100. *Id.*

A. The Shortcomings of the Legal Model and Historic-Institutional Model

This section begins by considering the legal model and the historic-institutional model and demonstrating ways in which these two models were unable to explain the Supreme Court's decision. Since this section argues that the legal model and historic-institutional model cannot explain the decision in hindsight, it seems to follow that these models cannot satisfactorily predict the outcome of a future fleeting expletives case.

1. The Legal Model—A Beacon of Unsophistication

The difficulty with the legal model is that it fails to explain how the Second Circuit and the Supreme Court reached diametrically opposite results. The arbitrary and capricious standard is by its nature subject to differing applications. Pursuant to *Motor Vehicle Manufacturers'. Association v. State Farm Mutual Automobile. Insurance Co.*,[101] for example, the Court could have found that because the FCC failed to provide an adequate factual basis for its finding that fleeting expletives are indecent, it likewise failed to demonstrate a rational connection between the policy change and the reasons supporting that policy change.[102] Relying on the same precedent, the Court also could have found (as it ultimately did) that the FCC's action was neither arbitrary nor capricious on the basis that the Court should not substitute its judgment for that of the agency.[103] Since it seems that the Court could have found either way based on its own precedent, the inquiry then becomes one of determining what underlying motivations actually influenced the Justices in their decision. The legal model does not satisfactorily address that inquiry.

Furthermore, despite the Supreme Court's opinion, some scholars suggest that the Second Circuit's decision was the right one. As Justin Winquist notes, "[c]onsidering the variability with which arbitrary and capricious review has been applied . . . the [Second Circuit's] decision was not blatantly erroneous."[104] That the standard has been applied differently in the first place suggests the legal model is ill-equipped to explain the differences in opinion regarding arbitrary and capricious review. Moreover, the Supreme Court's reversal of the Second Circuit decision when the decision was not "blatantly erroneous" indicates that something more than pure legal analysis guided the Supreme Court's decision. Hutchinson says,

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101. 463 U.S. at 46.

102. *See* Hutchinson, *supra* note 3, at 240.

103. *Id.* at 241.

104. Justin Winquist, Note, *Arbitrary and F^@#$*! Capricious: An Analysis of the Second Circuit's Rejection of the FCC's Fleeting Expletive Regulation in* Fox Television Stations, Inc. v. FCC *(2007)*, 57 AM. U. L. REV. 723, 736–37 (2007) (citations omitted).

"[o]f course, the manner in which the arbitrary and capricious review is employed depends not only on the composition of the Court, but also on the facts of the particular case."[105] One would not expect pure legal analysis to vary regardless of who occupies the seats on the bench, and as a result, the legal model fails to explain the outcome of *Federal Communications Commission v. Fox*.

2. The Historic-Institutional Model—Unrealistic and Fatally Flawed?

The historic-institutional model similarly fails to explain the outcome of the case. Although it is perhaps true that institutional characteristics define the contours of the Justices' decisions, it seems implausible that the Court in *Federal Communications Commission v. Fox* would not have reached the same decision were it not for those institutional characteristics. It is difficult to comprehend the Court's decision if one assumes that it was primarily informed by the Court's role within the United States' political system. While one might argue that the Court, given the ground swell of public opinion against fleeting expletives, was trying to maintain its institutional prestige as a socially responsive organization, the vast majority of complaints directed to the FCC stemmed from only one organization: the PTC.[106] The Court has always held that the tendency of speech to offend does not determine its permissibility, especially when the offense is confined to a limited segment of society.[107] Because nearly all of the complaints here were tied to one organization, it seems unlikely that the Court was concerned with its reputation as a socially responsive institution. Thus, when one considers the competing claims that Justices make decisions in an effort to maximize their policy preferences, as opposed to the claim that Justices are altruistic actors seeking to preserve the legitimacy of the Court as an institution, the former seems more tenable.

That is not to say that some of the organizational attributes that Gillman identified could not have contributed to the outcome of *Federal Communications Commission v. Fox*. For example, the Justices' pre-decision conference or the ability of the Justices to print and circulate drafts of opinions might have led to a decision focusing exclusively on the arbitrary and capricious question rather than the underlying First Amendment question.[108] Where the institutional model falls short, however, is that it cannot explain how the Justices' actions, which were seemingly influenced by the institutional characteristics of the Court, do not more

105. Hutchinson, *supra* note 3, at 239.
106. Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d Cir. 2007).
107. *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971).
108. *See* Gillman, *supra* note 87, at 82.

accurately reflect strategic or attitudinal motivations. Unlike Gillman's discussion of *Brown v. Board*, the Justices here did not seem at all concerned with preserving the legitimacy of the Court as an institution.

Another problem with the institutional model is that it seems to derive much of its force from many of the same principles that underlie the legal model.[109] It is one thing to say, for example, that the Court is concerned with preserving its legitimacy. If one believes this to be true, the question that naturally arises is, "what gives the Court its legitimacy in the first place?" For many people, it is the belief that the Court decides cases purely in accordance with the law that accomplishes this task. In other words, it is those same principles that make up the legal model that lay the foundation for the institutional model as well. But it is already clear that the legal model cannot sufficiently explain the outcome of *Federal Communications Commission v. Fox* because the arbitrary and capricious review standard is subject to a variety of applications. Since there is no one clear way to apply arbitrary and capricious review, the Justices must have relied upon something more than pure legal analysis. The institutional model, unfortunately, does not explain what the Court relied upon when it rendered its five-to-four decision.

B. Getting There? The Strategic Model as a Possible Explanation for the Outcome of Federal Communications Commission v. Fox

The strategic model comes closer to providing a satisfactory explanation for the Court's decision in *Federal Communications Commission v. Fox* because the decision reflects a conscious choice by the majority to pursue the procedural arbitrary and capricious question even though the substantive constitutional question was equally viable. One possible explanation for this choice is that Chief Justice Roberts was aware that if the Court tried to answer the First Amendment question, the outcome would not have been what he wanted. Thus, in an effort to prevent a decision that would invalidate the FCC's policy, Roberts assigned the opinion to Justice Scalia, who agreed that the appropriate way to address the case was to focus exclusively on the arbitrary and capricious question, despite indicating at oral argument that he did not believe the speech here deserved constitutional protection.[110] In order to garner the necessary fourth and fifth votes to render a binding majority opinion, though, Chief Justice Roberts and Justices Scalia and Alito knew they had to frame the issue in part as being the appropriate role of the judiciary when reviewing agency

109. *See id.* at 80 (suggesting that most judges decide actual legal disputes in accordance with their best understanding of the law).

110. *See* Transcript of Oral Argument at 48–52, FCC v. Fox TV Stations, 129 S. Ct. 1800 (2009).

policies. Otherwise, it appears that Justices Thomas and Kennedy would have reached a different conclusion even though they were quick to agree that, while the FCC's policy was perhaps misguided, it was not arbitrary or capricious.[111]

Consistent with Epstein and Knight's account of the strategic model, *Federal Communications Commission v. Fox* can be interpreted as an example of interdependent judicial decision making. The outcome was contingent upon not only Chief Justice Roberts's or Justices Scalia's or Alito's individual attitudes and actions; it also depended upon the attitudes and actions of the remaining six Justices. If one assumes, then, that Chief Justice Roberts and Justices Scalia and Alito wanted to uphold the FCC's policy, the inquiry those Justices had to undertake was how to do so while remaining within the institutional contours of the Court. Through initial conference discussions and the initial predecision vote, it probably occurred to them that the way to preserve the FCC's policy was to avoid the constitutional issue altogether and to focus on the question of whether the Second Circuit erred in finding the policy arbitrary and capricious. One of Fox's principal arguments before both the Second Circuit and the Supreme Court was that the FCC's policy was unconstitutional.[112] That the majority of the Court entirely failed to address that question reflects strategic decision making on behalf of some of the Justices.

The strategic model also might explain how a minority of the Court was able to reach the outcome it wanted when it appears that a majority of the Court believed the policy to be unduly intrusive on broadcasters' First Amendment freedoms. As some scholars have argued, "at the heart of the decision-making process are policy-oriented justices who employ a 'mixture of appeals, threats, and offers to compromise' to encourage their colleagues to support legal rulings that reflect their policy preferences."[113] This apparent bargaining could explain how a minority of the Court was able to persuade a majority to support its view.

The limit of the strategic model, although not necessarily invalidating, is that the model can be understood only if one assumes that Justices seek to implement legal policies that reflect their individual goals. Since goal-oriented Justices are influenced most by their individual or personal attitudes, it is difficult to explain the Justices' strategic behavior without

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111. *See* FCC v. Fox TV Stations, 129 S. Ct. 1800, 1819–21 (2009) (Thomas, J., concurring).

112. Brief for Respondent Fox TV Stations, Inc. at 42, FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582).

113. James F. Spriggs, II, Forrest Maltzman & Paul J. Wahlbeck, *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POLITICS 485, 486 (1999) (citation omitted) (quoting WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 42 (1973)).

first understanding the Justices' individual attitudes. Thus, while the strategic model might indeed provide some insight into the outcome of *Federal Communications Commission v. Fox*, it seems that any strategic behavior ultimately cannot be separated from the individual attitudes that motivated the Justices' strategic behavior in the first place.

C. *Attitudinalism—The Proven Model Proves Itself Again*

That being said, the attitudinal model of judicial decision making provides the best explanation for the Justices' behavior. If one considers simply the outcome of the case and not the alleged justification—that is, that the Court upheld the FCC's policy—the Justices reached a seemingly conservative result to the extent that the outcome favored the government. Not only that, but the actual opinion was split by a five-to-four vote, almost perfectly along ideological lines. As Alexander Tahk and Stephen Jessee indicate, along the ideological spectrum, Justice Thomas is far to the right, Justice Scalia is far to the right, Justice Kennedy is slightly to the right, Chief Justice Roberts is to the right, and Justice Alito is to the right.[114] Together, those five Justices make up the conservative block on the Court.[115] On the other side of the spectrum are Justices Ginsburg, Breyer, Stevens, and Souter, who represent the liberal block.[116] It is, therefore, no coincidence that the majority opinion reflects the views of the conservative Justices who comprise the majority of the Court.

Given Justice Thomas's and Justice Kennedy's concurring opinions, along with the dissenting opinions, it seems that if the Court had addressed the First Amendment issue, the outcome of the case might have come out in favor of the broadcasters.[117] But it is curious as to how the Court could reach two separate outcomes regarding the same case. In other words, if the attitudinal model is truly capable of explaining the outcome of the case, then the Justices' attitudes cannot be limited to only substantive issues.

As Harold Spaeth intimated, many scholars believe that attitudes extend not only to substantive issues, but to other issues such as judicial restraint and strict construction.[118] It is entirely possible, then, that the outcome of *Federal Communications Commission v. Fox* represents the Justices' attitudes on the appropriate role of the Court when reviewing administrative agencies' policy determinations and not the Justices' views

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114. *See* Alexander Tahk & Stephen Jessee, *Current Beliefs*, SUPREME COURT IDEOLOGY PROJECT, http://sct.tahk.us/current.html (last visited Nov. 12, 2010).

115. *See id.*

116. *See id.*

117. *See* FCC v. Fox TV Stations, 129 S. Ct. 1800, 1819–22 (2009) (Thomas, J., concurring); *id.* at 1822–24 (Kennedy, J., concurring); *id.* at 1824–28 (Stevens, J., dissenting); *id.* at 1828–29 (Ginsburg, J., dissenting); *id.* at 1829–41 (Breyer, J., dissenting).

118. *See* Spaeth, *supra* note 60, at 305.

on the First Amendment. Such a distinction nicely explains Justice Thomas's concurring opinion in which he said, "I join the Court's opinion, which, *as a matter of administrative law*, correctly upholds the Federal Communications Commission's (FCC) policy with respect to indecent broadcast speech under the Administrative Procedure Act."[119] Thomas's opinion indicates that his attitude toward the Court's role in reviewing agency decisions is one of deference, which required him to find for the FCC unless the decision was so untenable as to render it arbitrary and capricious. Yet, while it appears Justice Thomas was motivated by his attitude toward judicial review of agency determinations, the other Justices might have been motivated by their attitudes toward the arbitrary and capricious review standard or toward the underlying First Amendment issue. Since judicial attitudes are not confined to either substantive or procedural matters, the attitudinal model best explains the outcome of *Federal Communications Commission v. Fox.*

D. Why It All Matters—Implications of the Finding that Attitudinalism Predominates Judicial Decision Making

What follows from this result is that the outcome of a given case often depends on who is occupying the seats on the bench. When the Court experiences a change in personnel, the potential outcome of various cases can change, especially cases that would otherwise be closely split. Since the Court recently experienced a personnel change, with Justice Sotomayor replacing Justice Souter and Justice Kagan replacing Justice Stevens, it is important to consider how the fleeting expletives issue might be affected. On one hand, it is entirely possible that with Sotomayor and Kagan replacing two of the dissenting Justices, there will be no resulting shift in doctrine on the issue of fleeting expletives. Because the Court is more likely to see a constitutional challenge the next time it hears a fleeting expletives case, though, it is at least worthwhile to consider how the addition of Justices Sotomayor and Kagan to the Court might affect the outcome with respect to the First Amendment issue, especially in light of Thomas's concurring opinion and the dissenting opinions.

V. JUSTICE SONIA SOTOMAYOR'S FIRST AMENDMENT RECORD ON THE COURT OF APPEALS AND OTHER SIGNS OF HER ATTITUDE TOWARD THE FIRST AMENDMENT

More often than not, a Supreme Court Justice's attitudes will reflect to some extent the attitudes of the President who appointed him or her.[120]

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119. *FCC v. Fox*, 129 S. Ct. at 1819 (Thomas J., concurring) (emphasis added).

120. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL 31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 8–9

Consequently, because Justice Sonia Sotomayor was appointed by a liberal president, Barack Obama, one might reasonably expect her (and possibly Kagan[121]) to take a liberal stance on issues of great concern such as the First Amendment. "In issues pertaining to . . . [the] First Amendment, . . . a case is classified as liberal if the outcome favored . . . the civil liberties or civil rights claimant . . . ."[122] A close review of the decisions then-Judge Sotomayor issued while on the Second Circuit reveals that her First Amendment record is somewhat mixed.[123] Many times, she upheld First Amendment challenges to government regulations.[124] Yet, on other occasions, she authored opinions that many First Amendment advocates found alarming.[125]

A. Sotomayor's Judicial Record on First Amendment Issues

Probably her most high-profile First Amendment decision came in *United States v. Quattrone*.[126] In that case, Judge Sotomayor invalidated the decision of the lower court, which had issued a gag order to prevent the press from revealing the names of any prospective or selected jurors in the trial of Credit Suisse First Boston executive Frank Quattrone.[127] In her decision, Judge Sotomayor wrote:

> A judicial order forbidding the publication of information disclosed in a public judicial proceeding collides with two basic First Amendment protections: the right against prior restraints on speech and the right to report freely on events that transpire in an open courtroom. Because nothing in this case justified the district court's infringement of these two central freedoms, we hold that the court's order violated the Free Speech and Free Press clauses of the First Amendment.[128]

She further explained, "though the district court considered and rejected the possibility of an anonymous jury, the record does not demonstrate sufficient consideration of measures other than a prior restraint that could

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(2010).

121. At the time of publication, Elena Kagan's Segal-Cover score was not available. As this Note focuses on judicial decision making, the discussion of Kagan's potential liberal lean based on her appointment by a liberal president is beyond the scope of this discussion. *See infra* note 150, and accompanying text.

122. Lee Epstein et. al, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 44 (2005).

123. *See* David L. Hudson, Jr., *Sotomayor on the First Amendment*, FIRST AMENDMENT CENTER (May 28, 2009), http://www.firstamendmentcenter.org/analysis.aspx?21629.

124. *See id.*

125. *See* Ronald K. L. Collins, *Sotomayor and Free Expression*, FIRST AMENDMENT CENTER (May 28, 2009), http://www.firstamendmentcenter.org/commentary.aspx?id=21637.

126. 402 F.3d 304 (2d Cir. 2005).

127. *See id.*

128. *Id.* at 308.

have mitigated the effects of the perceived harm."[129] Thus, because of the court's special disdain for prior restraints, and because the district court failed to consider alternative mechanisms for reducing the alleged harm, Judge Sotomayor invalidated the gag order.

In another case involving a different type of gag order, Judge Sotomayor authored an opinion that rejected a number of constitutional challenges to a rule prohibiting overseas organizations that receive U.S. funds from providing abortion services.[130] Relying upon Second Circuit and Supreme Court precedent, Judge Sotomayor reiterated, "the government is within its constitutional authority in imposing restrictions or conditions on the receipt of USAID funding by [foreign NGOs]."[131] Because domestic NGOs were free to use their own funds to pursue their endeavors, no First Amendment violation had occurred.[132]

In the context of protest demonstrations, Judge Sotomayor, in *Papineau v. Parmley*, determined that people have a right to express their views through protest, and "the police may not interfere with demonstrations unless there is a 'clear and present danger' of riot, imminent violence, interference with traffic or other immediate threat to public safety."[133] Sotomayor continued, "on the facts alleged, we cannot say as a matter of law that the police had an objectively reasonable basis to conclude that the plaintiffs presented a clear and present danger of imminent harm or other threat to the public at the time of the arrests."[134] By forcefully arresting the protestors in the absence of any reasonable belief that their actions would result in some sort of public harm, the police officers violated the First Amendment.

As a federal district judge in *Campos v. Coughlin*, Judge Sotomayor addressed the question of whether a prison could, consistently with the First Amendment, prevent prisoners from wearing particular religious artifacts such as religious beads.[135] She declared:

> While I defer to defendants' assessment of the gang situation . . . and I accept defendants' assertions that beads are gang identifiers . . . [d]efendants have not shown how the directive, which prohibits the wearing of beads even under clothing, furthers the state's compelling interest in the least restrictive manner."[136]

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129. *Id.* at 311.

130. Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183 (2d Cir. 2002).

131. *Id.* at 192 (quoting Ctr. For Reprod. Law & Policy v. Bush, No. 01 CIV. 4986(LAP), 2001 WL 868007, at *10 (S.D.N.Y. 2001)) (internal quotation marks omitted).

132. *Id.* at 190.

133. Papineau v. Parmley, 465 F.3d 46, 57 (2d. Cir. 2006) (quoting Cantwell v. Connecticut, 310 U.S. 296, 308–09 (1940)).

134. *Id.* at 60.

135. 854 F. Supp. 194 (S.D.N.Y. 1994).

136. *Id.* at 207–08.

Finding in favor of the prisoners, Judge Sotomayor went on to say that allowing the prisoners to wear their beads under clothing would indeed address the defendants' concerns while still preserving the free exercise of religion.

One of Judge Sotomayor's most troubling votes, according to First Amendment scholar Ronald K. L. Collins,[137] occurred in *Doninger v. Niehoff*.[138] In that case, which involved a student's online blog entry criticizing the principal, the Second Circuit decided that students' First Amendment freedoms are limited, even if the speech occurs off school grounds, to the extent that such speech could substantially disrupt the school environment.[139] Purporting to rely upon the Supreme Court's precedent in *Tinker*,[140] and the Second Circuit's precedent in *Wisniewski v. Board of Education*,[141] the court in *Doninger* found that it was reasonably foreseeable that the student's blog could cause a substantial disruption because of the particularly offensive language she used in the blog, the misleading information contained therein, and the blogger's unique position as a leader in the student government.[142] The result of the decision, as Collins suggests, was a ratcheting down of First Amendment freedoms any time it is "reasonably foreseeable" that their expression could result in "*any* disruption, however insubstantial or however caused."[143]

The foregoing decisions reflect only a small subset of the cases implicating the First Amendment with which now-Justice Sotomayor has been involved. They do nevertheless demonstrate Justice Sotomayor's seemingly inconsistent views on the First Amendment. Yet to conclude, based on these opinions, that Justice Sotomayor actually holds inconsistent views on the First Amendment would be overly simplistic.

Drawing on Spaeth's observations regarding the attitudinal model, a Justice's attitudes can encompass normative issues such as judicial restraint and strict construction.[144] Consistent with that idea, Collins summarizes Justice Sotomayor's record nicely:

> What her *Quattrone, Papineau* and *Campos* opinions [in particular] reveal is a judge disposed to deciding cases on the narrowest grounds with careful scrutiny of the facts. There is nothing bold in her opinions, no "big picture" *dicta* about the jurisprudence of prior restraints or freedom of assembly or prisoner rights and the First Amendment.

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137. Collins, *supra* note 125.
138. 527 F.3d 41 (2d. Cir. 2008).
139. *See id.* at 48.
140. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
141. 494 F.3d 34 (2d. Cir. 2007).
142. *See Doninger*, 527 F.3d at 48–53.
143. Collins, *supra* note 125 (emphasis in original).
144. *See* SEGAL & SPAETH, *supra* note 47, and accompanying text.

> *Quattrone, Papineau* and *Campos* show the guarded mind of a jurist more in line with incremental context-based thinking than with, say the broad sweep jurisprudence of a Hugo Black or William Brennan. Nonetheless, they also reveal the mind of someone who seems to take First Amendment tests seriously enough to apply them rigorously.[145]

What emerges, then, is a clear picture of Justice Sotomayor's attitude regarding normative, rather than substantive, issues. One might conclude that her decision making follows a straightforward formula. Precedent and established doctrine control to the extent possible, but when a case does not fit within the preexisting framework, she will draw upon her attitudes toward substantive issues.

In the fleeting expletives context, prior precedent and general First Amendment jurisprudence would seemingly have led Justice Sotomayor to agree with the dissenters. In other words, it appears that Justice Sotomayor would agree with the initial FCC determination that because the use of fleeting expletives does not satisfy any categorical or First Amendment balancing analysis already established by Supreme Court doctrine, the use of fleeting expletives is beyond the scope of First Amendment indecency regulation.

Some scholars might contend, however, that any predictive quality of a judge's record on the court of appeals is somewhat skewed.[146] Judges at the court of appeals operate in a different context than the Supreme Court because they must be mindful that a wrongly decided case will be overturned.[147] Thus, while Justice Sotomayor's record might provide a glimpse into her judicial attitudes, her record is not necessarily dispositive of how she would decide a First Amendment case on the Supreme Court.[148]

B. Additional Indications of Sotomayor's View of the First Amendment

Even if one discards Justice Sotomayor's record as a court of appeals judge as incapable of predicting her judicial attitudes toward the First Amendment, there are other indications that she would be sympathetic to First Amendment challenges to government regulations. First, as previously mentioned, a Supreme Court Justice's attitudes often reflect the

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145. Collins, *supra* note 125.

146. Spaeth, *supra* note 60, at 313.

147. *Id.*

148. Yet, some scholars suggest that judicial attitudes about important issues emerge even at the court of appeals level. *See* Sunstein et al., *supra* note 72, at 302–06. Thus, one could infer that if judicial attitudes toward ideological issues can indeed affect the outcome of court of appeals cases, then the lack of expression of such attitudes might suggest a judicial attitude encompassing normative issues such as judicial restraint and strict construction.

attitudes of his or her appointing president.[149] Since Justice Sotomayor's appointer, President Barack Obama, is known as a reliable liberal, one could reasonably expect Justice Sotomayor to take a similar stance on First Amendment cases, meaning she would most likely favor the party contending that speech has been constrained.

Additional evidence that Sotomayor might hold liberal attitudes can be elicited from the endorsements she received from major newspapers. This analysis, named the Segal-Cover score after its creators, Jeffrey Segal and Albert Cover,[150] evaluates newspaper editorials from four of the most prominent newspapers in America: the *New York Times*, the *Wall Street Journal*, the *Chicago Tribune*, and the *Los Angeles Times*.[151] The Segal-Cover score characterizes the nominees prior to their confirmation as liberal or conservative on civil rights and liberties issues.[152] Although this analysis is somewhat premature at this point, Jeffrey Segal predicts that Sotomayor's score will define her as a moderate liberal,[153] again suggesting that she would be more inclined to favor the party bringing the First Amendment challenge.

C. The Remaining Justices' Attitudes on the Fleeting Expletives Issue

Since Justice Stevens's retirement, the composition of the Court is again in flux, leading to additional questions about the Court's future ideological leaning. Stevens's replacement, Elena Kagan, adds to the mystique because she is difficult to categorize. Although it is true that as Solicitor General, she argued in favor of seemingly broad laws curbing the freedom of expression, it is important to remember that her role as an advocate was very different than her future role as a Justice on the Supreme Court.[154] As a result, some scholars suggest that to better understand Justice Kagan's ideological attitudes, it is best to consider the articles she authored

149. *See* RUTKUS, *supra* note 120, at 8–9.

150. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

151. *See id.* at 557–59.

152. *Id.*

153. Amy Harder, *Keeping Score on Sotomayor*, NATIONALJOURNAL.COM (June 12, 2009, 4:15 PM), http://ninthjustice.nationaljournal.com/2009/06/if-confirmed-sonia-sotomayor-w.php.

154. *See* David L. Hudson, Jr., *Kagan's First Amendment Record Causes Concern*, FIRST AMENDMENT CENTER (MAY 10, 2010), http://www.firstamendmentcenter.org/commentary.aspx?id=22934&printer-friendly=y. *See also* David L. Hudson, Jr., *Solicitor-General Nominee: Impressive First Amendment Resume*, FIRST AMENDMENT CENTER (Jan. 8, 2009), http://www.firstamendmentcenter.org/analysis.aspz?id=21093 [hereinafter *Solicitor-General Nominee*].

as an academic.[155] A cursory review of her work reveals a very illuminated mind and a very thorough understanding of the First Amendment, but no clear ideological preferences.[156] One is, therefore, left to speculate about how Justice Kagan might vote in a case involving a First Amendment challenge to the FCC's new policy.

Nevertheless, it appears that if Justice Sotomayor votes the same way as her predecessor, the Court will be able to command a majority for overturning the policy on First Amendment grounds. Justice Ginsburg's dissenting opinion chiding the effect of the FCC's policy on the First Amendment indicates that she most likely believes the policy is unconstitutional.[157] Justice Breyer, revealing his own recognition of a First Amendment problem, added, "[o]f course, nothing in the Court's decision today prevents the Commission from reconsidering its current policy in light of potential constitutional considerations . . . ."[158] Even Justice Thomas's concurring opinion suggests that the Court needs to reevaluate its precedent concerning the use of expletives on the public airwaves.[159] Primarily, Justice Thomas asserted that the facts underlying the Court's leading precedent in *Red Lion*[160] and *Pacifica*[161]—that is, that the broadcast spectrum was limited, that broadcast media was uniquely intrusive, and that it was easily accessible to children—have changed to such a degree that broadcast media no longer deserve the unique disfavor it once suffered.[162]

As a result, it seems that based on Justice Sotomayor's First Amendment jurisprudence and other indications of her judicial attitude toward the First Amendment, in addition to the apparent attitudes of the remaining Justices, the Court should be able to command a majority for overturning the FCC's current policy on fleeting expletives. But the implications of this finding extend beyond the issue of fleeting expletives. With the recent addition of Justice Kagan, the Court's eased approach toward indecency regulation in the context of television broadcasts might very well extend to other forms of media regulation as well.

VI. CONCLUSION: THE FUTURE OF FLEETING EXPLETIVES BASED ON THE CURRENT COMPOSITION OF THE COURT

In the Supreme Court's recent decision in *Federal Communications*

155. *Solicitor-General Nominee*, *supra* note 154.

156. *See id.*

157. *See* FCC v. Fox TV Stations, 129 S.Ct. 1800, 1828–29 (2009) (Ginsburg, J., dissenting).

158. *Id.* at 1840 (Breyer, J., dissenting).

159. *See id.* at 1820–22 (Thomas, J., concurring).

160. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

161. FCC v. Pacifica Found., 438 U.S. 726 (1978).

162. *See, e.g.*, *FCC v. Fox*, 129 S.Ct. at 1821–22 (Thomas, J., concurring).

Commission v. Fox, the Court approved a new FCC policy that now allows fines and other sorts of punishment for fleeting or isolated use of expletives on public television broadcasts. In its brief, Fox made two primary arguments: first, the FCC's new policy was arbitrary and capricious under the APA, and second, the policy was unconstitutional under the First Amendment. Like the Second Circuit, the Supreme Court opted to bypass the constitutional question, and instead determined on the basis of the APA that the new policy was entirely rational and therefore legally justified. Because of the lingering First Amendment issue, however, it appears this saga has not yet seen its end.

Thus, with the hope of predicting what might happen if the Court addresses the First Amendment question, this Note considered four dominant models of judicial decision making—the legal model, the attitudinal model, the strategic model, and the historic-institutional model—and analyzed *Federal Communications Commission v. Fox* in light of those models to help understand how the Justices reached their decisions. What emerged was a clear example of attitudinal decision making. In other words, it appears that the Justices were mostly influenced by their individual attitudes or personal ideologies when they cast their votes. The implication of this finding is that the outcome of a constitutional inquiry regarding the fleeting expletives issue will depend upon the individual Justices who occupy the seats on the bench.

With Justice Sotomayor recently replacing Justice Souter, this Note evaluated not only Justice Sotomayor's ostensible attitude toward the First Amendment, but also the ostensible attitudes of the remaining Justices in order to try to determine how the current composition of the Court might influence the outcome of this issue. In short, it appears that in the event a First Amendment challenge is brought before the Supreme Court, a clear majority, including Justice Sotomayor, will likely rule in favor of the broadcasters, thereby invalidating the FCC's new policy. It is important to note that the ramifications of this case could well extend to other areas of media regulation. Thus, the Court may be on the brink of an entirely new approach toward the First Amendment in the field of communications law generally.